IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

Date of decision : December 07, 2006

Jhagar versus State of Haryana

Coram: Hon'ble Mr. Justice Virender Singh

Present: None for the appellant
Mr. Man Mohan Sikka, Assistant Advocate General, Haryana

Virender Singh, J.

Jhagar son of Matha, resident of Dhar, District Sirmour (HP), the appellant herein, was convicted under section 20 of the Narcotic Drugs and Psychotropic Substances Act (hereinafter referred to as 'the Act') vide impugned judgment of learned Additional Sessions Judge, Kurukshetra dated 11/12.10.1993 for allegedly keeping in his possession 400 grams of charas on 8.12.1992 when he was apprehended in the area of Police Station Ismailabad, District Kurukshetra. He was sentenced to undergo RI for ten years and to pay a fine of Rs 1 lac, in default thereof to further undergo RI for one year. Aggrieved by the same, he has preferred the instant appeal.

The record reveals that his substantive sentence was suspended

by this Court vide order dated 24.1.1994. When the present appeal was taken up for final disposal in May, 2005, no one had come present to assist this Court. So is the position even today. The instant appeal is on regular board since long and as such I do not want to detain myself any further and am disposing of the instant appeal after getting assistance from Mr. Man Mohan Sikka, learned Assistant Advocate General, Haryana who has read out the entire evidence before me. My attention has also been drawn to certain other relevant documents.

The prosecution case in short is that on 8.12.1992, SI Amar Nath PW5, the then Incharge, CIA, Pehowa along with other police officials was present at a drain bridge, Chanarheri in connection with investigation of a case titled State versus Om Parkash under section 20 of the Act registered at Police Station Ismailabad when he got a secret information about the appellant carrying poppy husk with him and was going towards village Kanthala. On receipt of this information he sent ruqa Ex. PE, on the basis of which formal FIR Ex. PE/1 was recorded. When he reached the bridge Kanthala, the appellant was sitting on the wall of the bridge. On inquiry he disclosed his name, parentage and complete address. SI Amar Nath then told him that he had suspicion that he was carrying some contraband and asked him about his option of search being conducted before the DSP. On the desire shown by the appellant, he was taken to the office of Shri Subhash, the then DSP Pehowa (PW4) and on his direction the search was

carried out. Charas was recovered from the cloth belt being tied by the appellant around his waist under the clothes he was wearing. On weighment it was found to be 400 grams. 100 grams was separated as sample and then sample parcel and other parcel carrying the residue were sealed with the seal of SI Amar Nath and were taken into possession vide recovery memo Ex. PD which was attested by aforesaid DSP and Jagan Nath HC, already accompanying the Investigating Officer. Seal after use was kept by DSP. Grounds of arrest were told to the appellant vide memo Ex. PF. Rough site plan Ex. PG was also prepared. The case property was deposited with SI Ram Charan, SHO of the concerned Police Station.

After completion of the investigation, the appellant was challaned who was charged under section 20 of the Act.

The prosecution in support of its case has examined HC Om Parkash PW1 who tendered his affidavit Ex. PA, Constable Ravi Dutt PW2 who also tendered his affidavit Ex. PB, SI Chander Pal Singh PW3 who recorded statement of certain witnesses, DSP Subhash PW4 before whom, the recovery was effected. PW5 SI Amar Nath was the Investigating Officer, whose investigation has already been alluded to in the preceding paras. The prosecution has also tendered into evidence report of Forensic Science Laboratory Ex. PC and gave up certain witnesses as un-necessary.

The plea taken up by the appellant was of false implication in this case. However, he did not produce any evidence.

After appreciating the entire evidence, the appellant was convicted and sentenced as stated herein-above. Hence this appeal.

I have heard Mr. Man Mohan Sikka, learned State counsel and with his assistance gone through the entire evidence minutely.

Mr. Sikka after reading out the statement of the Investigating Officer, very fairly states that in the case in hand, section 50 of the Act was attracted as it was a recovery from the person of the appellant whereas the provisions of section 50 of the Act have not been complied with by SI Amar Nath in its strict sense as the offer given to the appellant was partial in nature. He very fairly states that after the Investigating Officer had suspicion on the appellant of some contraband being carried, he was asked as to whether he wanted the search to be conducted in the presence of a DSP whereas according to the provisions of section 50 of the Act, he should have been apprised of his right of being searched in the presence of a Gazetted Officer or the Magistrate. The offer given in this case is partial in nature and, therefore, the prosecution cannot get out of this serious lacuna which knocks at the bottom of the case.

I appreciate the fair stand taken by Mr. Sikka. The case of the appellant is squarely covered by the ratio of a latest Supreme Court judgment rendered in **State of Himachal Pradesh vs Pawan Kumar, 2005 (2)** All India Criminal Law Reporter 653. It is clear from the evidence that the appellant was not apprised of his right nor any option was offered to him

for search being conducted in the presence of a Magistrate also. It is well settled that the option under section 50 of the Act need not be always in writing and can be oral also, but certainly it cannot be partial in nature. In my view, since the mandate of section 50 of the Act was not complied with by the prosecution, the appellant is entitled to be acquitted on this vital flaw alone. I do find certain other infirmities in the case of the prosecution as well especially with regard to the missing of link evidence, but I do not feel the necessity of entering into detailed discussion on that aspect as the aforesaid vital flaw is sufficient to discard the case of the prosecution in its entirety.

The net result is that the instant appeal stands allowed and the impugned judgment of conviction and sentence is set aside. The appellant is acquitted of the charge of section 20 of the Act. He is stated to be on bail during the pendency of the appeal and shall now be discharged of his bail bonds.

(Virender Singh)
Judge

December 07, 2006
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